Supreme Court, U.S.
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No. 97-___

In The

Supreme Court of the United States

October Term, 1997

LESLIE J. WEBSTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an Indictment alleging violations of 18 U.S.C. §§ 152 and 2(a) failed to comply with Rule 7(c)(1), Fed. R. Crim. P., by failing to allege "essential facts," including a description of the assets concealed and the estate of the bankrupt?

2. Whether the Indictment adequately informed the defendant of the charges and protected him against double jeopardy by failing to describe the assets allegedly concealed and the estate of the bankrupt?

3. Whether the Government, by introducing evidence of alleged concealment of stock in a corporation which owned the Hitching Post Bar, failed to limit its proof to the information it furnished in a bill of particulars which stated that the property allegedly concealed was the Hitching Post Bar?

4. Whether a person convicted of aiding and abetting the concealment of assets from a bankruptcy trustee has violated any judicial or administrative order, injunction, decree or process not addressed elsewhere in the guidelines under U.S.S.G. § 2F1.1(b)(2)(B)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Leslie J. Webster respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above-captioned case.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported (App. 1-32).[1] The District Court's decisions are unreported (App. 34-52).

JURISDICTION

The judgment of the Court of Appeals was entered on September 12, 1997 (App. 1). The Court of Appeals denied petitioner's motion for rehearing and suggestion for rehearing en banc on October 9, 1997 (App. 33). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

[1] All references to "App." are to the Appendix contained in the Petition for Certiorari.

CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS

The pertinent provisions of the United States Constitution:

> Fifth Amendment: [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . .
>
> Sixth Amendment: In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . . .

The pertinent statutes:

> 18 U.S.C. § 152(1): A person who
>
> > (1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;
>
> shall be fined under this title, imprisoned not more than 5 years, or both.
>
> 18 U.S.C. § 2(a): Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

The pertinent rule:

> Rule 7(c)(1), Fed. R. Crim. P.: **In General.** The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. . . . It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated.

The pertinent sentencing guideline:

(3) If the offense involved . . . (B) violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2 levels. If the resulting offense level is less than level 10, increase to level 10.

STATEMENT OF THE CASE

A. Nature of the Case

On July 10, 1996, the Government filed a three-count Indictment against Leslie J. Webster ("Webster") (R. 2, App. 53-54). Count I alleged that Webster, on or about March 25, 1991, knowingly and fraudulently concealed from a bankruptcy trustee property belonging to the estate of a debtor in bankruptcy in violation of 18 U.S.C. §§ 152(1) and 2(a). Count I did not describe the property that was concealed, nor did it identify the debtor (App. 53).

Webster submitted a Motion to Dismiss Counts II and III because the statute of limitations had run (R. 28). On motion of the Government (R. 39), Counts II and III were dismissed on October 30, 1996 (R. 43).

On September 3, 1996, Webster submitted his Motion to Dismiss Indictment for Failure to Include "Essential Facts" (R. 7) and his Motion for a Bill of Particulars (R. 9). On September 20, the Government served its Response to the Defendant's Motion for a Bill of Particulars (R. 20, App. 55-57). On October 18, the Magistrate-Judge issued his Report and Recommendation that Webster's Motion to Dismiss be denied (R. 27, App. 34-42). On October 29, the district court issued its Memorandum and Order denying Webster's Motion to Dismiss the Indictment (R. 44, App. 43-46).

On November 4, 1996, Webster moved the court to restrict the Government's proof to what it specified for Count I in its Response to the Bill of Particulars (R. 66, 4-5). The court denied the motion (R. 66, 6-7, App. 47-48).

On November 4-5, 1996, the case was tried to a jury. During the trial, the court overruled objections that the Government's proof went beyond what the Government provided in its Response to the Bill of Particulars (R. 66, 32). The jury returned a verdict finding Webster guilty of Count I of the Indictment (R. 51).

On January 14, 1997, the court sentenced Webster to a term of imprisonment of fifteen months, a fine of $4,000, an assessment of $50 and a three-year term of supervised release (R. 68, 38-45). The initial offense level was established at six, U.S.S.G. § 2F1.1(a), the bar not having any value. The court applied: (1) a four-level increase for

violation of a judicial order, injunction, decree or process under U.S.S.G. § 2F1.1(b)(3)(B) (App. 49-50); (2) a two-level increase for abuse of a position of trust under U.S.S.G. § 3B1.3; and (3) a two-level increase for obstruction of justice by presenting false testimony at trial under U.S.S.G. § 3C1.1 (R. 68, 33-36). Judgment was entered on January 21, 1997 (R. 57, App. 51-52).

The Court of Appeals affirmed the Judgment of Conviction, vacated the sentence and remanded for resentencing because of inadequate findings of obstruction (App. 1-32). The court denied Webster's Petition for Rehearing and Suggestion for Rehearing En Banc (App. 33). Jurisdiction of the district court was based upon 18 U.S.C. § 3231. Jurisdiction of the Court of Appeals was based upon 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

B. Statement of Facts

Webster is a lawyer, 43 years of age, and has been practicing law since June, 1979 (R. 67, 27-28). He has practiced as a solo practitioner since approximately 1987 or 1988 (R. 67, 29). His practice is a general practice (R. 67, 30). He does a fair amount of divorce and family law; wills, trusts and estate planning; bankruptcy; business; tax and tax returns; general litigation; workmen's compensation; and other smaller areas (*Id.*). Typically, he sees about 100 to 200 clients per month (R. 67, 31). He does an average of 10-15 bankruptcies a year and has been doing bankruptcy work since he started practicing law (R. 67, 31-32).

Steven Deiss ("Deiss") worked for Joseph Schommer ("Schommer") from 1979 to 1986 (R. 66, 10-11). Deiss

described his relationship with Schommer as that of a "second dad" (R. 66, 11). He also testified that he and Schommer had a father-son relationship and that they trusted each other implicitly (R. 66, 42-43).

Schommer had obtained the Hitching Post Bar through foreclosure (R. 66, 10, 106-107). Schommer also owned Joe's Valley Bar for 38 years (R. 66, 102). Deiss managed the Hitching Post Bar for two years, from 1984 until 1986, and bought the bar in July, 1986 from Schommer (R. 66, 42). Deiss purchased the bar from Schommer on a land contract with no money down and 8% interest (R. 66, 10, 103-104). Webster was not involved as an attorney in this transaction (R. 66, 110-111; R. 67, 44-45). Deiss admitted that when he took over the bar, he and Schommer had an agreement that if Deiss faced financial difficulties, Deiss would turn the bar back to Schommer without having to go through foreclosure proceedings (R. 66, 43). Schommer considered Deiss a very capable person in running the bar (R. 66, 106-107).

On January 11, 1991, Deiss met with Webster to incorporate the bar. (R. 66, 14; R. 67, 33). Schommer had no objection (R. 66, 107). Deiss wanted to incorporate the bar because Minnesota had a law where tavern owners could become responsible for injuries caused to patrons as a result of excessive drinking. Webster had done some work for Deiss before, and so Deiss wanted Webster to assist in the incorporation (R. 66, 15). Since Webster thought that Deiss was not in a very good financial position and was concerned about costs of incorporating, he quoted him a $400 fee (R. 67, 35). Webster's usual fee for an incorporation is $700 (R. 67, 36). Webster ordered

stock certificates in blank with physically printed certificate numbers made out in the name of Hitching Post Bar, Inc. (R. 67, 35-36).

At the initial meeting, Deiss discussed his personal finances with Webster (R. 66, 17). Deiss testified that he and his wife Shelley had high credit card debt, although they could keep their heads above water (*Id.*). Mrs. Deiss said it was difficult to make ends meet, especially with the high credit card debt (R. 66, 94). Deiss testified that he also had been making regular payments to Schommer on the land contract and had not missed a payment (R. 66, 17).

January 17, 1991 was the first conference between Webster and Deiss regarding bankruptcy (R. 67, 40). Deiss testified that they were discussing the possibility of bankruptcy and were going forward with the incorporation (R. 66, 18). He recalled executing documents that quit claimed the bar from individual ownership to corporate ownership and a bill of sale to transfer the fixtures, furniture, equipment and inventory to the corporation (R. 66, 19-20). Webster testified that once Deiss decided to file bankruptcy, he told Webster that his agreement with Schommer was that if anything went wrong and if he ever got into financial trouble, he would transfer the bar back to Schommer and not make Schommer go through any foreclosure (R. 66, 43). The bar had overdrafts (R. 66, 57-58) and was losing money (R. 67, 10), even though Deiss was working between 90 and 100 hours a week and was not drawing a salary (R. 66, 14, R. 67, 10). Webster charged his normal fee of $650 for the bankruptcy (R. 67, 38) and an additional $200 for an adversary proceeding (R. 67, 40).

Deiss filled out a bankruptcy work sheet listing his assets and liabilities (R. 66, 24-26). On the work sheet, the bar was listed as having been voluntarily surrendered to Joe Schommer in January, 1991, for release of unpaid balance of land contract (R. 66, 28-29). This listing was in Webster's handwriting (R. 66, 29, 121-22). Above this entry was a notation "bar, $54,000 debt" (R. 66, 28). The bankruptcy schedules filed with the bankruptcy court similarly stated that Deiss voluntarily surrendered the bar business to Schommer in January, 1991, for release of unpaid balance of land contract (R. 66, 30). Deiss admitted signing that statement (*Id.*). Deiss testified that statement was not accurate because he did not actually surrender the bar to Schommer (R. 66, 31). He also testified that his statement that he did not own any stock at the time of the bankruptcy petition filing was not true (R. 66, 32). But Deiss also testified that he was to give up ownership of the bar on paper before the bankruptcy and then reacquire the bar sometime after the bankruptcy. (R. 66, 33). He said this was done to avoid having the bar appear as an asset on the bankruptcy schedules (*Id.*).

There was a conflict in the testimony as to when the stock certificates for Hitching Post Bar, Inc. were issued. The Government introduced four stock certificates (Govt. Exs. 2A, 2B, 2C and 2D) (R. 66, 21, 41-42). Deiss testified that he did not see them until after September 17, 1992 (R. 66, 21-22). Webster's secretary testified that the stock certificates were received in Webster's office on March 11, 1991 (R. 66, 128). Webster testified that the first stock certificate for 100 shares, Govt. Ex. 2A, was issued to Deiss in return for conveying the real estate and personal property to the corporation sometime between March 11

and March 21, 1991 (R. 67, 41-42). He also testified that Certificate No. 2, Govt. Ex. 2B, also for 100 shares, was then issued to Schommer after Deiss surrendered his stock certificate to the corporation and assigned it to Schommer (R. 67, 42). It was Webster's understanding that Schommer then owned all of the stock of the corporation (*Id.*). This was also Deiss' understanding at the time of the bankruptcy (R. 66, 33, 67). However, Schommer denied owning stock even when he was shown Certificate No. 2 in his name and his acknowledged signature thereon (R. 66, 112).

Webster testified that Deiss was concerned about what would happen to the bar in bankruptcy (R. 67, 46). Webster explained to Deiss that putting the stock certificate in Schommer's name would not necessarily mean that the bankruptcy trustee would not have the authority over it (R. 67, 46). He told Deiss that any transfer from a debtor to a creditor within ninety days of the date of filing bankruptcy is considered a voidable preference. If the bankruptcy trustee believes that the asset is worth more than what was owed against it, the trustee has the right to take it back and liquidate it for the benefit of creditors *(Id.)*. Although Deiss was a little concerned, both he and Webster believed that the bar was not worth more than the land contract balance, and, therefore, he was not overly concerned *(Id.)*.

On April 29, 1991, Deiss, his wife Shelley, and Webster attended a creditors' meeting at the bankruptcy court in Eau Claire (R. 66, 33-34; R. 67, 48). Webster told his clients that they could anticipate some questions about the bar (R. 67, 48-49). Webster testified that he told his clients that they should tell the trustee that Schommer

owned the stock (R. 67, 49). Deiss testified that his wife asked what they should say if the trustee questioned us about the bar. Webster's response was that she should say that Deiss voluntarily surrendered the bar back to Schommer in January (R. 66, 35). Deiss also testified that Webster told him the trustee was lazy and would not ask about the bar (*Id.*).

Deiss testified that the trustee asked if the bankruptcy schedules filed in his case were true and that he falsely stated that they were (R. 66, 36). He stated that at no point in the bankruptcy proceeding did he tell the trustee that the bar had not actually been given back to Schommer and that he – Deiss – continued to own and operate it (R. 66, 37). Deiss admitted on re-cross examination that, at the time of the § 341 hearing, he thought that Schommer owned the stock in Hitching Post Bar, Inc. (R. 66, 67). At the time of the § 341 hearing, Shelley did not know whether she thought that she and her husband still owned the bar (R. 66, 98).

Bernard J. Driscoll, an accountant, prepared the 1991 federal Subchapter S corporate tax return for Hitching Post Bar, Inc. and the 1991 individual tax returns for Deiss and for Schommer (R. 67, 22). Webster had no dealings with Driscoll in the preparation of those returns (R. 67, 22-23). Those returns showed that for the year 1991, Schommer was the 90% owner and Deiss as the 10% owner of Hitching Post Bar, Inc. The losses from the corporation were passed through to the individual tax returns of Schommer and Deiss on a 90%-10% basis (R. 67, 24). On March 17, 1992, Deiss filed an annual report

with the Wisconsin Secretary of State indicating Schommer as president of Hitching Post Bar, Inc. and 100 shares of stock issued (Def. Ex. 11; R. 66, 49).

On May 26, 1992, the Hitching Post Bar burned down (R. 66, 88). Deiss filed a sworn proof of loss with Midwest Insurance Company (R. 66, 38-39). Deiss had trouble collecting on the insurance policy and hired Webster to help him (R. 66, 40). Upon reviewing the corporate records, including the two stock certificates, they ascertained that all the stock was owned by Schommer (R. 67, 54). Deiss did not want Schommer to own all the stock, since it was originally his intention to transfer the stock to Schommer for a short period of time and then put it back into his name. (*Id.*). Webster testified Deiss asked him to prepare stock certificates to transfer the stock back to Deiss' name (*Id.*). Webster explained that he could not do that unless Schommer signed off on his stock certificate (*Id.*). Deiss said that would not be any problem, and Schommer subsequently signed off on his stock certificate (*Id.*).

Webster explained that the pledge language was added to the certificates to give Schommer a lien to secure the balance owed on his land contract. (R. 67, 43). Webster suggested to Deiss and Schommer that Schommer retain a security interest in the stock (R. 67, 55). Webster's secretary then typed the pledge language on Certificate No. 2, Govt. Ex. 2B, but since the certificate was already in Schommer's name and one cannot pledge stock to himself, two additional stock certificates were issued to accomplish the pledge, Certificates No. 3 (50 shares) and No. 4 (450 shares), Govt. Exs. 2C and 2D. These certificates were both issued to Deiss, but the 450

share certificate (Govt. Ex. 2D) was pledged to Schommer (R. 67, 56).

Raymond Hoveland, the insurer's claims manager, investigated the claim (R. 66, 130-132). He understood that Deiss owned the bar, although there were contrary documents in the bankruptcy stating that the bar had been transferred to Schommer (R. 66, 132). He also acknowledged that Schommer had provided information that he was a 50% shareholder and that Deiss told Hoveland that his mortgage holder, Schommer, was also a shareholder (R. 66, 136-137). On June 18, 1992, Deiss also told the insurer's investigator, Lawrence Plack, that Schommer was a stockholder and that he had a "goodwill contract." The "goodwill contract" was that if Deiss had financial trouble, Schommer could sign Deiss out of the corporation and that Schommer would sign the stock back over to Deiss when the bar was paid for (R. 66, 52).

On September 17, 1992, Hoveland met Webster at Deiss' examination under oath (R. 66, 133-134). The examination was conducted by Robert Terhaar, the insurer's attorney (R. 66, 134). At the end of that examination, Webster stated that Deiss pledged, but did not transfer the stock to Schommer, a statement he testified at the trial was not accurate (R. 67, 58).

Deiss pled guilty and was convicted of making a false oath in connection with his bankruptcy proceeding (R. 66, 42). His understanding was that the Government would move for a downward departure within the guidelines if he would cooperate in the investigation of Webster (*Id.*).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW HOLDING THE INDICTMENT SUFFICIENT SUBSTANTIALLY DEPARTS FROM SUPREME COURT PRECEDENT AND CONFLICTS WITH A TENTH CIRCUIT DECISION.

This Court has always insured that indictments allege sufficient facts so as to inform the accused of the nature and cause of the charge. With respect to an indictment alleging that the defendant aided and abetted the debtor's concealment of assets from a bankruptcy trustee, to comply with Rule 7(c)(1), Fed. R. Crim. P., and with Webster's rights under the Fifth and Sixth Amendments, the Indictment should have described what property was allegedly concealed and identified the estate of the debtor involved.

The Opinion conflicts with important precedent of this Court to require compliance with Rule 7(c)(1) to insure that a criminal defendant's Fifth and Sixth Amendment protections are not violated. *Russell v. United States*, 369 U.S. 749, 760-761 (1962).

In *Russell v. United States*, the petitioners were indicted and subsequently convicted because of their refusal to answer certain questions when summoned before a congressional subcommittee. This Court noted that in each case the indictment returned by the grand jury failed to identify the subject under congressional subcommittee inquiry at the time the witness was interrogated, stating only that the questions to which answers were refused "were pertinent to the question then under inquiry" by the subcommittee. *Russell*, 369 U.S. at 752.

This Court dismissed the indictments because they failed to provide "essential facts."

> A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture.

Russell, supra, at 766.

Count I of the Indictment failed to identify the estate of the debtor or the property that Webster allegedly concealed under 18 U.S.C. § 152(1). The prosecution was allowed a free hand to select the property allegedly concealed or the bankruptcy estate involved. Webster is an attorney in general practice who does approximately ten to fifteen bankruptcies per year. Since he was charged with aiding and abetting, it was important for the Indictment to identify what estate was involved and what property was concealed.[2] Webster could not determine from the Indictment the specific factual bases for Count I of the Indictment and could not, with "reasonable certainty," determine the nature of the accusations being made against him. The Indictment also left Webster unprotected from another charge if acquitted as nothing

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[2] The Opinion (App. 13) states that Webster has not suggested that he filed any other bankruptcies on March 25, 1991, in the Western District of Wisconsin. Webster represents he transmitted the Deiss bankruptcy petition for filing with two other bankruptcy petitions on the same day. The § 341 hearings for the three bankruptcies, including the Deiss bankruptcy, were held at the same time (R. 67, 48).

would prevent the prosecutor, in another prosecution, to allege concealment of another item of property.

Although the Opinion referred to *Russell's* statement that convictions are no longer reversed because of minor and technical deficiencies in the indictment (App. 11), it failed to follow *Russell*. The statutory term "pertinent" in *Russell* needed factual allegations in order to notify the accused of the charge. Here, the terms "trustee" and "property" similarly needed some factual description in order to provide Webster notice of the charge and ability to plead former jeopardy.

In *United States v. Carll*, 105 U.S. 611, 612 (1881), this Court dismissed an indictment which failed to allege all elements of the offense, including "all the facts necessary to bring the case within that intent [of the Legislature]." Similarly, in *United States v. Hess*, 124 U.S. 483 (1888), this Court dismissed an indictment which failed to advise the accused of the "facts and circumstances" of the specific offense. *Hamling v. United States*, 418 U.S. 87 (1974), upheld the sufficiency of an indictment charging 21 counts of using the mails to carry an obscene book, *The Illustrated Presidential Report of the Commission on Obscenity and Pornography*, and an obscene advertisement as to how the *Illustrated Report* might be obtained. The indictment in *Hamling* alleged the identity of the obscene publication. In this case, the Indictment should have contained a description of the property concealed and identified the estate of the bankrupt.

The Opinion also conflicts with *United States v. Arge*, 418 F.2d 721 (10th Cir. 1969), which holds that the essential elements that must be alleged in an 18 U.S.C. § 152(1)

action include (c) a description of the property concealed and (d) the identification of the parties from whom the property was concealed.

In *United States v. Mathies*, 203 F. Supp. 797, 800 (W.D. Pa. 1962), the Court held the description identifying property as "merchandise commonly sold in a self-service department store" as insufficient. It cited several cases where generalized descriptions of property were upheld, stating:

> In Rudin v. United States, [254 F.2d 45, 48 (6th Cir. 1958)], the concealed property was described as "cash in the amount of * * * and merchandise inventory consisting of miscellaneous groceries in the amount of * * * *". In Greenbaum v. United States, 280 F. 474, (6 Cir. 1922), the language was "money and merchandise to the value of * * * *". In Kanner v. United States, 21 F.2d 285, (2 Cir. 1927), the language was "moneys and properties then and there belonging to the estate in bankruptcy". In Keslinsky v. United States, 12 F.2d 767, (6 Cir. 1926), the goods were described as "certain goods, wares, moneys, merchandise, shoes and personal property belonging to said bankrupt estate". In Gerson v. United States, 25 F.2d 49, 8 Cir. 1928), the language was "certain merchandise belonging to the estate in bankruptcy of the said Abraham Gerson, to wit, merchandise of the value of * * * and the cash received from a sale thereof * * * *".

With respect, the authority the Opinion cites does not justify its conclusion. *Kanner v. United States*, 21 F.2d 285 (2d Cir.), *cert. denied*, 275 U.S. 564 (1927), involved an indictment against bankrupts who allegedly concealed

"money and property" from the trustee. However, Webster was not the bankrupt, and, therefore, the identity of the estate and concealment of assets in the bankruptcy were not peculiarly within his knowledge. Moreover, the Government conceded that at the time it filed the Indictment it knew the identify of the debtor whose estate was involved and the property allegedly concealed (App. 13). This is not a case where it was impossible, or even difficult, for the Government to describe the assets allegedly concealed or the identity of the bankruptcy estate.

There is no known authority which upholds an indictment under 18 U.S.C. § 152(1) alieging a description which merely states "property belonging to the estate of a debtor in bankruptcy." Such an indictment fails to inform a defendant of the nature and cause of the accusation as required by the Sixth Amendment. This holding is a substantial and significant departure from the precedent of this Court which requires allegations of "essential facts" and precedent in other circuits which require at least some minimal description of the property allegedly concealed.

II. THE DECISION BELOW ALLOWING THE GOVERNMENT TO PROVE FACTS BEYOND THOSE PROVIDED IN ITS BILL OF PARTICULARS IS CONTRARY TO PRECEDENT FROM OTHER CIRCUITS.

By allowing the Government to prove facts beyond those provided in its Bill of Particulars (App. 55-57), the Opinion below conflicts with decisions in other circuits

which strictly limit the Government's proof to what it furnished in a bill of particulars.

> In the absence of amendment the bill of particulars concludes the rights of all parties to be affected by it, and the government's case is confined to the particulars it has furnished, although unimportant variance may be ignored.

Charles A. Wright, *Federal Practice and Procedure*, § 130, pp. 448-49 (2nd ed. 1982). Case law holds that the Government may not introduce evidence that is not within the scope of information provided in its bill of particulars.

> More importantly, a bill of particulars, like an indictment, is designed to define and limit the government's case. As with the indictment, there can be no variance between the notice given in a bill of particulars and the evidence at trial.

United States v. Smith, 776 F.2d 1104, 1111 (3rd Cir. 1985), citing *United States v. Neff*, 212 F.2d 297, 309 (3rd Cir. 1954). See *United States v. Payden*, 613 F. Supp. 800, 816 (S.D.N.Y. 1985) ("The court must be cognizant of the fact that a bill of particulars confines the government's evidence at trial to the particulars furnished"). See also *Land v. United States*, 177 F.2d 346, 349 (4th Cir. 1949).

The court (App. 15-17) justifies this expansion of proof by pointing to the second paragraph (App. 51) which references alleged false statements regarding not having any stock or interest in incorporated and unincorporated companies. However, this paragraph related to Count II of the Indictment which was dismissed prior to trial. See Opinion, App. 16, fn. 9.

In its Bill Of Particulars (App. 54-55), the Government stated:

> (1) The transaction or activity constituting the offense charged in Count I of the indictment was the defendant's aiding and abetting the concealment of Steven Deiss' ownership of the Hitching Post Bar.

The Hitching Post Bar was included on the bankruptcy schedule. It stated:

> Voluntarily surrender Bar business to Joseph Schommer in January 1991 for release of unpaid balance of Land Contract.

This statement clearly indicates that the bar could be an asset within the definition of the debtor's estate, since Deiss owned the bar within one year of the filing of bankruptcy. By revealing its existence, Webster could not possibly have "prevented discovery" of the bar by the bankruptcy trustee.

However, at trial, the Government did not limit its evidence to the issue of ownership of the Hitching Post Bar. Although it was admitted that Deiss had conveyed the Hitching Post Bar to a corporation, Hitching Post Bar, Inc., prior to the bankruptcy, the Government also introduced evidence regarding ownership in the stock of the Hitching Post Bar, Inc.

The Government argued that no prejudice occurred because its proof involved stock instead of the bar itself. There was prejudice. Had the Government's case been confined to concealment of the bar, the issue would simply have been that of its concealment. It would have been exceedingly difficult to persuade a jury that concealment

of the bar occurred when it was listed on the schedules as a preference and when the trustee admitted he knew about the bar and asked questions about it.

On the other hand, expansion of the proof to include stock and stock certificates forced Webster to expand his defense and get into the issue of tax returns which showed that after the bankruptcy, Schommer and Deiss reported owning respectively 90% and 10% of the stock. Moreover, it allowed the Government to prove that the bankruptcy filings did not disclose Deiss' ownership of the stock. Based on that as well as the district court's expansive instruction on concealment (R. 67, 134, A.70), the jury could have convicted Webster because Deiss arguably retained a 10% interest in Hitching Post Bar, Inc. This shows prejudice because Webster was never informed that he was criminally responsible for aiding and abetting Deiss' concealment ownership of 10% of the stock.

III. THERE IS A CONFLICT IN THE CIRCUITS REGARDING APPLICATION OF U.S.S.G. § 2F1.1(b)(3)(B) TO CONCEALMENT OF ASSETS FROM A BANKRUPTCY TRUSTEE.

U.S.S.G. § 2F1.1(b)(3)(B) applies a two to four level enhancement if the offense involved a "violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines."

Neither the specific language of § 2F1.1(b)(3)(B) nor Application Note 5 specifically refers to bankruptcy fraud. The application note suggests that there must be a "prior warning" in the form of a specific court order that

the defendant violated in the course of concealment, as occurred in *United States v. Mohammed*, 53 F.3d 1426, 1437 (7th Cir. 1995). *United States v. Carrozzella*, 105 F.3d 796, 800 (2nd Cir. 1997), opined that the term "violation of any judicial process" applied to fraud defendants "only when they commit their fraud in the face of some type of official warning or order directed specifically to them."

Nevertheless, a number of circuits have applied the adjustment to persons convicted of bankruptcy fraud without proof of violation of a specific order. Some have used the theory that a debtor's concealment of assets is a violation of the bankruptcy "process" whereby the debtor in return for a discharge discloses and makes available to the bankruptcy court all of his assets. See *United States v. Lloyd*, 947 F.2d 339, 340 (8th Cir. 1991); *United States v. Michalek*, 54 F.3d 325, 331 (7th Cir. 1995); *United States v. Welch*, 103 F.3d 906, 908 (9th Cir. 1996); *United States v. Messner*, 107 F.3d 1448, 1457 (10th Cir. 1997). One circuit has held that a debtor's concealment of assets violates an "order" of the bankruptcy court. *United States v. Bellew*, 35 F.3d 518, 520-21 (11th Cir. 1994). The First Circuit rejected this theory in *United States v. Shadduck*, 112 F.3d 523, 529-30 (1st Cir. 1997), declining to reach the issue of whether such concealment violated a judicial "process." *Id.* at 531.

This Court should review this case to determine the extent to which § 2F1.1(b)(3)(B) applies to bankruptcy fraud cases. There is a direct conflict in the circuits as to whether concealment violates an "order" and uncertainty as to the extent to which concealment violates a "process." As stated in *Carrozzella, supra*, it is quite difficult to

fit bankruptcy fraud into the language of § 2F1.1(b)(3)(B) or to match it with the commentary and examples.

The "process" rationale simply does not fit. Webster did not seek protection from his creditors. The only benefit he received were fees of $650 for handling the bankruptcy and $200 for an adversary proceeding. Second, no assets were concealed, diverted and sold during the bankruptcy proceeding, as in *Mohammed, supra*. Indeed, the bar was listed as an asset available to the trustee as a voidable preference, and the bankruptcy trustee, Kaiser, testified that he asked Webster questions about it before determining that it had no value to the estate. Third, there is no evidence that any order of the bankruptcy court made during the pendency of the bankruptcy was ever violated. Webster received no prior warning that he was violating any court order, injunction, decree or process. Finally, the Government did not even contend at sentencing that the bar had any value above the amount owed at the time of the bankruptcy, so there was no harm to the estate or the creditors.

In anticipation that the Government will argue that Webster is an attorney who should have known better, Webster would point out that consideration has already been dealt with in light of the two-level enhancement imposed under U.S.S.G. § 3B1.3 for abuse of position of trust or use of a special skill.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: November 19, 1997

In the
United States Court of Appeals
for the Seventh Circuit

No. 97-1189

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LESLIE J. WEBSTER,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 96 CR 48 – **John C. Shabaz**, *Judge.*

ARGUED JUNE 6, 1997 – DECIDED SEPTEMBER 12, 1997

Before CUMMINGS, RIPPLE and ROVNER, *Circuit Judges.*

RIPPLE, *Circuit Judge.* After a two-day trial by jury, Leslie J. Webster was found guilty of aiding and abetting the fraudulent concealment of a debtor's property from a bankruptcy trustee in violation of 18 U.S.C. §§ 152(1) and 2(a). On appeal Mr. Webster raises issues concerning the indictment, the bill of particulars, the trial court's evidentiary rulings, the sufficiency of the evidence and certain enhancements to his sentence. For the reasons set forth in

the following opinion, we affirm in part and vacate in part the judgment of the district court and remand the case for further proceedings.

I

BACKGROUND

Leslie J. Webster has been practicing law since 1979; he is a sole practitioner with a general practice that includes, he estimates, ten to fifteen bankruptcies a year. Mr. Webster's legal assistance in Steven Deiss' bankruptcy led to Mr. Webster's indictment on the charge of bankruptcy fraud.

In July 1986, after managing the Hitching Post Bar in Beldenville, Wisconsin for two years, Steven Deiss purchased the establishment from his friend Joseph Schommer. In January 1991, Deiss retained Mr. Webster to incorporate the ownership of his business in order to limit his liability. While Mr. Webster was proceeding with the incorporation, he advised Deiss and his wife to review their finances and debts and to consider filing a bankruptcy petition to have their debts discharged.

On February 1, 1991, Mr. Webster completed the incorporation process; Deiss' bar and its assets were conveyed to the new corporation for a return of stock.[1] Deiss

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[1] Apparently only four stock certificates in Hitching Post Bar, Inc. were issued. All four were dated February 1, 1991. The first certified that Deiss owned 100 shares and transferred them to Schommer. The second certified that Schommer owned 100 shares; however, on the reverse side, it stated that Deiss had pledged the shares to Schommer as collateral for the land

and his wife were the only directors; Deiss was the registered agent as well. Mr. Webster notarized the corporation documents.

On March 25, 1991, Deiss and his wife, following Mr. Webster's advice, filed a voluntary Chapter 7 bankruptcy petition. Mr. Webster, their attorney in the bankruptcy proceeding as well, drafted the Deisses' bankruptcy schedules and the "Statement of Financial Affairs for a Debtor Not Engaged in Business." Two responses in those documents led to the charges in this case. First, the financial statement asked whether any of the debtors' property had been returned to, or repossessed by, the seller or a secured party within the past year. Mr. Webster, on behalf of the Deisses, answered that Deiss had "voluntarily surrendered Bar business to Joseph Schommer in January 1991 for release of unpaid balance of Land Contract." Gov't Ex.3. Absent from the bankruptcy filings was any mention that, on the eve of the bankruptcy, the Bar actually had been incorporated and that Deiss' assets in the Bar had been conveyed to that corporation. Second, on the debtors' list of personal property on Schedule B-2 of

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contract. The third certificate indicated that Deiss owned 50 shares outright. The fourth represented that Deiss had pledged the 450 shares he owned to Schommer.

All the certificates had been backdated. Mr. Webster's secretary testified at trial that the stock certificates arrived in the law office on March 11, 1991. Mr. Webster testified that the first two certificates were issued to Deiss and then assigned to Schommer between March 11 and 21, 1991; the second two were issued after the bar burned, sometime in mid-1992. However, Deiss testified that he did not see the certificates until sometime after September 17, 1992. Moreover, Schommer denied owning stock.

the bankruptcy petition, Mr. Webster failed to report any stock ownership in the Hitching Post Bar Incorporated; instead, he reported "0" stock ownership and no real property. Id. At the section 341 creditors meeting, the Deisses stated under oath that the bankruptcy petition and schedules were true and complete.[2] Attorney Webster told Bankruptcy Trustee Kaiser that this was a "no asset case." R.20, Ex.B at 2. The bankruptcy court granted the Deisses a discharge on July 16, 1991.

However, Deiss continued to manage, operate and own the Hitching Post Bar as his own until the Bar was destroyed by fire in May 1992. After the fire, Deiss filed a claim with his insurance company and hired Mr. Webster to help him collect on the claim. Mr. Webster prepared a proof of loss listing "Steven C. Deiss d.b.a. the Hitching Post Bar" as the contract purchaser/stockholder, with an encumbrance to Mrs. Deiss and land contract vendor Joseph Schommer. When the claims manager obtained Deiss' bankruptcy records, however, he questioned the legitimacy of Deiss' insurance claim. Consequently, the insurance company's attorney examined Deiss under oath on September 17, 1992. Mr. Webster appeared on Deiss' behalf.

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[2] The first meeting of the creditors of a debtor is held pursuant to 11 U.S.C. § 341 and is usually called a § 341 meeting or hearing. Its purpose is to give creditors and the trustee the opportunity to examine the debtor concerning his acts, conduct, property or any other matter that may affect the administration of the bankruptcy estate or the debtor's right to a discharge or to the dischargeability of certain debts. *See* B. Weintraub & A. Resnick, *Bankruptcy Law Manual* § 1.11[3] (1980).

During that interview, Deiss admitted that the bankruptcy schedules and financial report contained false statements; they indicated that ownership of the Bar had been transferred to Schommer. However, Deiss stated under oath that he never had transferred ownership of the Bar.[3] Mr. Webster attempted to clarify the ownership issue by explaining that Deiss had pledged – but not transferred – stock to Schommer and thus that Schommer had a lien on the stock but no ownership of the Bar.[4]

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[3] Deiss also reported that the bankruptcy filings falsely reported the following information: (1) Deiss had not been engaged in business for the six years preceding bankruptcy; (2) Deiss had no income in 1988 and 1989; (3) Deiss kept no accounts or records; (4) there was no listing of monthly land contract payments to Schommer; (5) Deiss had "surrendered" or transferred the Bar to Schommer. Deiss admitted that these statements were not true.

[4] Mr. Webster's full explanation is as follows:

> Something you might want to note for clarification purposes is that with respect to the Bar, Steve [Deiss] was under the impression – Steve didn't realize the difference between pledging and transferring stock and what he did do in late January or early February [1991] was give Joe a lien on the stock because Joe never had a lien on the personal property of the corporation and so he did do that and he – it was his understanding that that meant that Joe owned 90 percent of the bar and it wasn't until I explained to him it wasn't to go – that's not what he did at all, what he did was he actually pledged that stock to him which gives him a lien on it. It doesn't actually transfer the stock to him and that's part of the execution.

Gov't Ex.9 at 283-84. At his own trial, Mr. Webster admitted that this statement was not true and that Schommer had owned the stock. In fact, the pledged stock certificates were created after

Ultimately the insurance company settled with Deiss and paid his claim. Deiss continues to own the lot where the Bar stood.

In February 1996, Deiss was charged with bankruptcy fraud; he pleaded guilty to making false statements under oath in a bankruptcy proceeding in violation of 18 U.S.C. § 152(2). His cooperation with the government led to Mr. Webster's indictment in July 1996 on the charge of aiding and abetting the fraudulent concealment of property from a bankruptcy trustee.[5]

At Mr. Webster's trial, Deiss testified that the statement on the bankruptcy schedules that the Bar was voluntarily surrendered to Schommer was false and was intended to avoid having the Bar appear as an asset of his bankruptcy estate. He testified that there had been a plan to make it appear on paper as though Schommer owned the Bar. However, Deiss knew that the bankruptcy schedules were false and that he was giving a false statement to the trustee by declaring that the schedules were correct. Schommer and Mrs. Deiss confirmed Deiss' statement; Mrs. Deiss further testified that Mr. Webster had advised the Deisses how to respond to any questions from the bankruptcy trustee about the Bar. Schommer testified that Deiss owned the Bar continuously from 1986 until it burned in 1992 and made monthly payments on the land

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the fire and were backdated to February 1, 1991, he explained, as Deiss had asked him to do.

[5] Count I alleged that Mr. Webster fraudulently concealed from a bankruptcy trustee property belonging to a debtor's estate, in violation of 18 U.S.C. §§ 152(1) and 2(a). Counts II and III were dismissed.

contract throughout that period. The bankruptcy trustee testified that the statements on the bankruptcy schedule caused him to believe that Deiss no longer owned the Bar and thus that it was not an asset available for liquidation and satisfaction of Deiss' debts. Deiss also testified that he never had seen the four stock certificates until after he gave the statement under oath to the insurance company's attorney on September 17, 1992.

Mr. Webster testified at trial that the stock certificate designating that Schommer owned 100 shares of stock accomplished the transfer of ownership in the Bar from Deiss to Schommer. He explained that that certificate was executed before the bankruptcy petition was filed and that the two certificates in Deiss' name were executed after the fire in order to evince the return of ownership to Deiss. Mr. Webster further testified that the certificates were backdated to validate corporate decisions made between the date of incorporation and the time the shares were received and executed. According to Mr. Webster, the language on the certificates about pledging the stock to Schommer was added in order to grant a security interest to Schommer when the time came for him to transfer the Bar back to Deiss. When asked why he stated to the contrary during Deiss' statement under oath to the insurance company attorney, Mr. Webster stated that he was "trying to end the deposition which had dragged on for eight hours with mostly irrelevant questions of Mr. Deiss." R.67 at 83-84. Accountant Bernard Driscoll testified that the 1991 federal Subchapter S corporate tax return for Hitching Post Bar, Inc., showed that Schommer was the 90% owner and Deiss the 10% owner. After the two-day trial, the jury returned a guilty verdict. Mr.

Webster was sentenced to 15 months in prison. He raises six issues in this appeal.

II

DISCUSSION

A. *Sufficiency of the Indictment*

1. The Essential Elements

Count I of the indictment against Mr. Webster, the count on which he was tried and convicted, alleges:

> On or about March 25, 1991, in the Western District of Wisconsin, the defendant, LESLIE J. WEBSTER, knowingly and fraudulently concealed from a trustee charged with the control and custody of property in connection with a case under Title 11 of the United States Code, property belonging to an estate of a debtor in bankruptcy. (All in violation of Title 18, United States Code, Sections 152(1) and 2(a)).

The bankruptcy fraud statute Mr. Webster allegedly violated states:

> A person who –
>
> (1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;
>
> . . .

> shall be fined under this title, imprisoned not more than five years, or both.

18 U.S.C. § 152. The question before us is whether the indictment complies with Federal Rule of Criminal Procedure 7(c)(1), which states:

> The indictment or information shall be a plain, concise and definite statement of the essential facts constituting the offense charged.

The magistrate judge and district judge each concluded the indictment was sufficient; the court then denied the motion to dismiss the indictment.

Before this court Mr. Webster reiterates that the indictment should have been dismissed as insufficient under Rule 7(c)(1). Relying on *Russell v. United States*, 369 U.S. 749 (1962), Mr. Webster asserts that the indictment must contain a statement of the "essential facts" and circumstances that would apprise the accused, " 'with reasonable certainty, of the nature of the accusation against him.' " *Id.* at 766 (citation omitted). In this case, as in *Russell*, Mr. Webster claims, the indictment did not identify "essential facts," namely the property he allegedly concealed from a trustee and the bankruptcy estate involved. He submits that he could not determine which of his past actions he had to defend simply by being told the date of the alleged crime and the elements of that crime. Mr. Webster urges us to follow our earlier decision in *United States v. Hinkle*, 637 F.2d 1154 (7th Cir. 1981). The indictment in *Hinkle*, as in this case, set forth the statute allegedly violated and the dates on which the alleged violation occurred. Just as the *Hinkle* court held

that an indictment must provide crucial, minimal information about "the gravamen of the alleged offense," *id.* at 1158, so too this court should hold, urges Mr. Webster, that the indictment before it was required to plead the essential elements and that its failure to provide a description of the fraudulently concealed property of the debtor violated Rule 7(c)(1).

We review de novo the sufficiency of an indictment. *United States v. Briscoe*, 65 F.3d 576, 582 (7th Cir. 1995). The Supreme Court has established the criteria by which to measure the sufficiency of an indictment: It is sufficient if it "first, contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling v. United States*, 418 U.S. 87, 117 (1974); *see United States v. Allender*, 62 F.3d 909, 914 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 781 (1996). Notably, the Court in Russell praised, as a "salutary development in the criminal law," the fact that "[c]onvictions are no longer reversed because of minor and technical deficiencies [in the indictment] which did not prejudice the accused." 369 U.S. at 763.

This court has upheld as "usually sufficient" "[a]n indictment that uses the language of the statute when setting forth the offense . . . 'as long as the statutory language unambiguously sets out all the elements necessary to constitute the offense.' " *United States v. Locklear*, 97 F.3d 196, 199 (7th Cir. 1996) (quoting *Allender*, 62 F.3d at 914 (citing *Hinkle*, 637 F.2d at 1157)). Clarity and lack of ambiguity in the cited statutory terms are required. *See United States v. Carll*, 105 U.S. 611, 612 (1881) (holding

that an indictment is generally sufficient when the statutory terms "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished"). The terms of § 152 are unambiguous, and an indictment cast in these unambiguous terms is marginally sufficient. *Hinkle* required more specificity in the indictment at issue there because the statutory term "facilitate" in 21 U.S.C. § 843 ambiguously could have referred to any of several criminal acts; thus the indictment, which did not identify any act that facilitated the crime or any illegal drug involved, failed to notify the accused of the "gravamen of the alleged offense." 637 F.2d at 1158. *Russell* presented a similar problem. In that case, the statute underlying the indictment, 2 U.S.C. § 192, punished anyone who "refused to answer any question *pertinent* to the question under inquiry." The Supreme Court pointed out that "the very core of criminality under [that statute] is pertinency to the subject under inquiry of the questions which the defendant refused to answer." 369 U.S. at 764. It then concluded that an indictment that repeats the statutory language, without more, fails to inform a defendant of the nature of the charge against him when "guilt depends so crucially upon such a specific identification of fact." *Id.*

The indictment against Mr. Webster does not contain the same degree of ambiguity with respect to the nature of the accusation. The indictment alleges, in the language of the statute, the time and place of the fraudulent concealment; the person accused of violating the bankruptcy fraud statute; the manner ("knowingly and fraudulently") in which he concealed the property; the general identification of the party (a "trustee") from whom it was

concealed; and the general identity of the property as part of a bankruptcy estate. By following the statutory language of 18 U.S.C. § 152(1), the indictment included all of the essential elements of the substantive offense. It did not fail to allege a required statutory criterion. *See, e.g., Locklear,* 97 F.3d at 199 (holding that the indictment was insufficient because it failed to allege an essential element of the offense under 18 U.S.C. § 493). Consequently, this indictment in the statutory form is sufficient. In fact, when this indictment for bankruptcy fraud is measured by indictments standardly used in drug conspiracy cases, it compares favorably: In such cases, an allegation of the conspiracy, the time frame involved, and the statute allegedly violated is sufficient.[6]

Addressing the question of the need for factual detail in the indictment charging this offense, the Second Circuit has explained that, with respect to the crime of concealing bankruptcy assets, "one which is peculiarly within the bankrupt's own knowledge, and one which may be committed under circumstances which render impossible a description of the assets concealed," it is permissible "to excuse particularity of description" and to use general terms. *Kanner v. United States,* 21 F.2d 285, 287 (2d Cir.) (upholding as sufficient an indictment alleging concealment of "monies and properties then and

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[6] *See United States v. Edwards,* 105 F.3d 1179, 1181 (7th Cir. 1997) (stating that an indictment for conspiracy to distribute drugs need not identify the controlled substances or the quantities involved), *petition for cert. filed* (U.S. April 21, 1997) (No. 96-8732); *United States v. Spears,* 965 F.2d 262, 279 (7th Cir.) (stating indictment "need not allege overt acts"), *cert. denied,* 506 U.S. 989 (1992).

there belonging to the estate of the bankrupt"), *cert. denied*, 275 U.S. 564 (1927); *See United States v. Vanderberg*, 358 F.2d 6, 10 (7th Cir. 1966) ("An indictment for a violation of 18 U.S.C.A. § 512 need not allege evidentiary facts showing the manner of the concealment."). Mr. Webster cannot claim that he could not prepare a defense simply by knowing the offense and the date of the alleged crime. He has not suggested that he filed any other bankruptcies on March 25, 1991 in the Western District of Wisconsin. Moreover, the Deisses' bankruptcy was a no-asset case with only one property needing explanation in the bankruptcy: the Bar that was "surrendered" to Schommer. Thus the crime was "one which is peculiarly within the debtor's own knowledge." *Kanner*, 21 F.2d at 287. In addition, Mr. Webster sought more information through a bill of particulars, and he received the identification of the property at issue. *See United States v. Mosley*, 786 F.2d 1330, 1334 (7th Cir.) ("When an indictment contains all the essential elements of the charged offense, the accused may obtain the factual proof supporting the charges, if vital to his defense, by a motion for a bill of particulars."), *cert. denied*, 476 U.S. 1184 (1986).

We conclude that the indictment against Mr. Webster, despite its lack of factual detail concerning the property allegedly concealed, is minimally sufficient.[7] *See Allender*, 62 F.3d at 914 ("The test for validity is not whether the

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[7] The government told us at oral argument that, at the time it filed this indictment, it knew the identity of the debtor whose estate was involved and the property being concealed. Yet it did not provide that information in the indictment. We do not understand why the government filed such a scanty indictment.

indictment could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards."). It is a "plain, concise and definite," unambiguous statement. The district court did not commit reversible error in denying Mr. Webster's motion to dismiss the indictment.

2. The Bill of Particulars

Along with his motion to dismiss the indictment, Mr. Webster filed a motion for a bill of particulars. The government responded to the motion by providing the following information concerning Count I of the indictment:

> The transaction or activity constituting the offense charged in Count I of the indictment was the defendant's aiding and abetting the concealment of Steven Deiss' ownership of the Hitching Post Bar.

R.20 at 1. Relying on *Russell*, Mr. Webster claims that the indictment is insufficient and "that a bill of particulars cannot save an invalid indictment." 369 U.S. at 770. According to Mr. Webster, the property identified in the bill of particulars was "the Hitching Post Bar," not "the Hitching Post Bar, Inc." Therefore the only permissible basis for conviction, he submits, was that he concealed ownership of the Bar itself. However, the trial court refused to confine the government's evidence at trial to proof that Mr. Webster aided and abetted the concealment

only of Deiss' ownership of the Bar.[8] Instead, over the defense counsel's objection, the government offered evidence that Deiss failed to disclose his ownership of the *stock* in Hitching Post Bar, *Inc.* Mr. Webster insists that the district court's error in permitting evidence beyond the scope of the bill of particulars might have led the jury to convict Mr. Webster based on Deiss' ownership of the stock instead of ownership of the Bar itself. According to Mr. Webster, this error requires reversal of his conviction.

The government responds that the bill of particulars merely amplified a valid indictment. The bill informed Mr. Webster that the government was focusing on the concealment of Deiss' ownership of the Bar, the property Deiss said he had transferred to Schommer. In the second paragraph of the bill of particulars, the government further explained: "The particular statements related to the Deiss' surrender of Hitching Post Bar to Joseph Schommer and their not having any stock or interest in

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[8] The district court explained its decision:

> The Court believes that the transaction or activity constituting the offense charged in Count 1 of the Indictment, the concealment of the ownership of the Hitching Post Bar, is inclusive of many of those documents which may very well have been an indicia of ownership, whether it be stock certificates, whether it be a land contract, whether it be a security agreement, whether it be an indicia of ownership relating thereto. . . . I believe the Indictment is specific as well as broad enough to show what those indicia of ownership were.

R.66 at 7.

incorporated and unincorporated companies."[9] R.20 at 1. Therefore, contends the government, neither the indictment nor the bill of particulars was inconsistent with the evidence at trial.

Mr. Webster argues that there was an impermissible variance of proof in this case between the proof offered at trial, demonstrating Deiss' ownership of stock in the Hitching Post Bar, Inc., and the bill of particulars, stating that the ownership issue concerned the Bar. In our view, there was no variance; the bill of particulars referred to concerns about Deiss' ownership both of the Bar and of stock, and it appended as exhibits the portions of Deiss' bankruptcy filings in which he stated that he had "voluntarily surrendered" the Bar business to Schommer and owned no stock or interests in incorporated or unincorporated companies. The information in the bill of particulars gave Mr. Webster all the information he needed to prepare his defense. The evidence at trial revealed that the Bar was incorporated. It was not surrendered to Schommer, and Deiss owned at least 10% of the stock in the Bar. In sum, Mr. Webster cannot succeed in obtaining reversal of his conviction by claiming a variance.[10]

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[9] This response by the government was related to the false statement Mr. Webster was alleged to have made under penalty of perjury, as alleged in Count II of the indictment. That count eventually was dismissed.

[10] *See United States v. Curtis*, 37 F.3d 301, 305 (7th Cir. 1994) (requiring defendant claiming variance to prove that the evidence at trial was insufficient to prove the jury's finding and that he was prejudiced), *cert. denied*, 513 U.S. 1154 (1995); *United States v. Mosley*, 786 F.2d 1330, 1335-36 (7th Cir.) (" 'A variance between [the information in a bill of particulars and the

The distinction Mr. Webster tries to draw between his ownership of the Bar and of shares of the Bar is meritless. The gravamen of the assertion is that the debtor's continuing ownership of the Bar was fraudulently concealed from the trustee on the bankruptcy schedules and that the concealment was accomplished by the joint efforts of the debtor and his attorney, Mr. Webster. *See United States v. Overstreet*, 106 F.3d 1354, 1358 (7th Cir.) (concluding that an adequate statute "constitutes a sufficient charge as used in the indictment," and, "supplemented with the bill of particulars, the indictment leaves no doubt what the charge meant and what constituted the offending conduct"), *cert. denied*, 117 S. Ct. 2491 (1997). We hold that the government's evidence at trial did not vary from the bill of particulars or the indictment.

B. *Evidentiary Rulings*

Mr. Webster submits that the district court abused its discretion in making two evidentiary rulings.

1.

The first ruling involved the testimony of Terry Blaedorn, an expert witness proffered by Mr. Webster to testify that the value of the Bar did not exceed the amounts owed on the land contract. The trial court

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evidence at trial] is not fatal unless the defendant has been deprived of an adequate opportunity to prepare a defense or has been exposed to a risk of being prosecuted twice for the same offense.' ") (citation omitted), *cert. denied*, 476 U.S. 1184 (1986).

granted the government's motion in limine to preclude such testimony on the ground that it was irrelevant. According to the court, the value of the Bar was not relevant to the questions whether the Bar was fraudulently concealed from the trustee or whether Mr. Webster intended the concealment.

Mr. Webster submits that an expert's testimony concerning the Bar's value would give credence to Mr. Webster's own position and would demonstrate that he lacked the intent to conceal property. We review the district court's preclusion of Mr. Webster's proffered expert testimony under the abuse of discretion standard, *see United States v. Navarro*, 90 F.3d 1245, 1262 (7th Cir. 1996); *Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183, 186-87 (7th Cir. 1993), and we conclude that the district court acted well within its discretion in refusing the admission of this testimony. The court allowed Mr. Webster to testify that neither he nor Deiss believed that the Bar had any value over and above the debt to Schommer at the time. The court also stated its willingness to admit the land contract, with the value redacted, at trial and to consider the value of the Bar at the time of sentencing. However, the court properly determined that the valuation of the allegedly concealed property has no bearing on Mr. Webster's material misrepresentations to the trustee, and Mr. Webster concedes that point.[11] The opinion of an

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[11] *See United States v. Grant*, 971 F.2d 799, 809 (1st Cir. 1992) (en banc) (value of asset concealed from trustee not relevant to determination whether violation of 18 U.S.C. § 152 occurred); *Kanner v. United States*, 21 F.2d 285, 287 (2d Cir. 1927) (value of concealed property not essential element of § 152).

expert hired by the defendant at the time of trial to assess the Bar's value has at best only a tangential relevance either to Mr. Webster's opinion of that value in 1991, when Mr. Webster advised Deiss on the bankruptcy filing, or to Mr. Webster's intent to conceal assets from the bankruptcy trustee. Its potential to confuse the jury is significant. We conclude that the district court did not abuse its discretion in excluding that expert testimony.

2.

The district court also abused its discretion, claims Mr. Webster, by refusing to admit testimony from two bankruptcy trustees concerning their standard treatment of voidable preferences.[12] The need for this testimony, Mr.

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[12] "Preferences are transfers in which an insolvent debtor favors certain creditors over others." 5 Lawrence P. King, *Collier on Bankruptcy* ¶ 547.10, at 547-93 (15th ed. rev. vol. 1997). Under § 547(b) of the Bankruptcy Code, a trustee may avoid certain prebankruptcy transfers as preferences. All the elements of an avoidable preference, as set forth in § 547(b), must be present before the trustee can avoid the transfer. "Essentially, the transfer, to be preferential, must diminish the fund to which other creditors can legally resort for the payment of their debts, thus making it impossible for other creditors of the same class to obtain as great a percentage as the favored one." *Id.* ¶ 547.03[2] at 547-23. " 'The purpose of the preference statute is to prevent the debtor during his slide toward bankruptcy from trying to stave off the evil day by giving preferential treatment to his most importunate creditors.' " *In re Midway Airlines, Inc.*, 69 F.3d 792, 797 (7th Cir. 1995) (quoting *In re Tolona Pizza Prods. Corp.*, 3 F.3d 1029, 1032 (7th Cir. 1993)).

The Code establishes that "it is the trustee alone who has the power to avoid preferential transfers." *Id.* ¶ 547.10 at 547-93. In this case, the debtor and his attorney declared that the Bar

Webster explains, arose after Deiss testified that Mr. Webster told him that Kaiser, the trustee assigned to the Deiss bankruptcy, was lazy and would not ask about the Bar.[13] To refute Deiss' testimony, Mr. Webster wanted the two trustees to testify concerning their standard practices regarding preferences. Bankruptcy Trustee Herrell was not allowed to testify at all. Trustee Kaiser testified, but

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was "surrendered" to Schommer for a release of the unpaid balance of the land contract. They, not the trustee, determined that the value of the Bar was equivalent to the contract balance and that the property should be transferred back to Schommer. Mr. Webster, in effect, usurped the decision-making power of the trustee and the bankruptcy court. *See United States v. Cherek*, 734 F.2d 1248, 1254 (7th Cir. 1984) ("Even if the asset is not ultimately determined to be property of the estate under the technical rules of the Federal Bankruptcy Code, Section 152 properly imposes sanctions on those who preempt a court's determination by failing to report the asset."), *cert. denied*, 471 U.S. 1014 (1985); *cf. United States v. Shadduck*, 112 F.3d 523, 528 (1st Cir. 1997) (concluding that debtor's reason for omitting pension funds from bankruptcy schedules – because they were exempt – "would short-circuit" the exemption-claim screening process in the Code). In fact, of course, the Bar was not transferred to Schommer at all; Deiss retained ownership. Thus the § 152 violation is actually fraudulent misrepresentation of the transfer. *See* 11 U.S.C. § 548 (the fraudulent transfer provision that grants to the trustee the authority to avoid a transaction that was made within one year of the bankruptcy filing date and "that depletes the debtor's assets to the detriment of the bankruptcy estate"); 5 King, *Collier on Bankruptcy* ¶ 548.01[1], at 548-5.

[13] Mr. Webster informs us that he certainly would not have known that Kaiser, the trustee ultimately assigned to Deiss' bankruptcy, would have been chosen from among the two trustees available. For this reason, he asserts, he would not have commented to Mrs. Deiss that Kaiser was lazy.

Mr. Webster claimed he was not permitted to explain his method for avoiding preferential transfers. Such testimony, Mr. Webster suggested, would have negated the government's suggestion that Mr. Webster knowingly falsified the bankruptcy schedule because he believed at the time that a lazy trustee had been assigned to the Deisses' case.

This contention is without merit. With respect to Trustee Kaiser, the district court hardly abused its discretion in determining that the bankruptcy trustee's standard practice in reviewing preferential property transfers was irrelevant.[14] Moreover, Mr. Webster's claim misrepresents what occurred at trial. Trustee Kaiser did testify about his evaluation of the transfer of the Bar, and Mr. Webster did cross-examine him extensively on whether the surrender could have been a preferential transfer.[15] With respect to the proffered testimony of Trustee Herrell, evidence from a bankruptcy trustee not involved in this case, describing his handling of preferential transfers, is even more irrelevant and was properly excluded. In this case, Mr. Webster failed to meet his burden of showing that the court abused its discretion when it

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[14] *See In re Sheridan*, 57 F.3d 627, 635 (7th Cir. 1995) (stating that reversal of a district court's evidentiary decision regarding expert testimony "requires more than bare arguments that the expert is qualified and his testimony would be relevant").

[15] The trustee defined "preference" and testified about the general procedure and his own normal procedure for looking at preferences. When defense counsel asked him whether it was his normal procedure to ask about preferences, Kaiser responded, "[I]f the schedules reflect that some transfer has been made that could be a preference, yes, sir, it is." R.66 at 90.

excluded expert testimony. We uphold the trial court's evidentiary rulings.

C. *Sufficiency of the Evidence*

Mr. Webster contends there was insufficient evidence to convict him of aiding and abetting in the concealment of Deiss' ownership of the Bar. He filed motions for judgment of acquittal at the close of the government's case, at the close of testimony, and following the verdict. Each motion was denied. We now consider his present challenge, on appeal, to the sufficiency of the evidence of bankruptcy fraud. Viewing that evidence in the light most favorable to the prosecution, we must decide whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *United States v. Ellis*, 50 F.3d 419, 422 (7th Cir.), *cert. denied*, 116 S. Ct. 143 (1995). Circumstantial evidence is sufficient to prove fraudulent intent and to support a conviction. *Ellis*, 50 F.3d at 422 (citing *United States v. Goodstein*, 883 F.2d 1362, 1365 (7th Cir. 1989), *cert. denied*, 494 U.S. 1007 (1990)).

Section 152 "criminalizes the conduct of those who knowingly and fraudulently transfer or conceal the property of a debtor." *Ellis*, 50 F.3d at 423. Mr. Webster claims that the government failed to prove three of the four elements of 18 U.S.C. § 152: It did not prove that the Hitching Post Bar belonged to the bankruptcy estate; that Mr. Webster aided and abetted the concealment of the Bar from the bankruptcy trustee; and that he helped conceal

the Bar knowingly and fraudulently. The undisputed evidence, states the defendant, is that the Bar was not part of the debtor's estate and that its preferential transfer to Schommer was shown on the Deisses' bankruptcy schedules. Such evidence as Deiss' continued management of the Bar during and after bankruptcy; his payments to Schommer; and his paying the bills, ordering supplies and obtaining insurance are not inconsistent with Schommer's ownership of the Bar, argues Mr. Webster, because Schommer trusted Deiss with the management of the Bar. In addition, he submits, he did not conceal assets; he listed the Bar as a preferential transfer.[16]

Mr. Webster's argument is based upon evidence carefully selected in the light most favorable to himself. When the evidence is viewed in the light most favorable to the government, however, it sufficiently establishes bankruptcy fraud. *See United States v. Key*, 859 F.2d 1257, 1260 (7th Cir. 1988) ("Section 152 prohibits false statements

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[16] Mr. Webster notes that, because the bankruptcy petition filings stated that Deiss surrendered the Bar in January 1991, the trustee could have treated the Bar as an asset that was part of the debtors' estate because it had been owned by the debtors within one year of filing. *See* 11 U.S.C. § 548(a). However, Mr. Webster assured the bankruptcy trustee that this was a "no asset case," *see* Gov't Ex.8, and the statement clearly suggested that the value of the Bar was equal to the unpaid balance of the land contract held by Schommer. No stock ownership was revealed. It is true that Deiss' bankruptcy filings, prepared by Mr. Webster as attorney of record, did not hide completely the existence of the Bar. Bits and pieces of information and misinformation were provided. However, neither Deiss nor Mr. Webster fulfilled his obligation to provide complete and truthful information to the trustee, an officer of the court. *See United States v. Jackson*, 836 F.2d 324, 329 (7th Cir. 1987).

and concealment of assets; no more and no less."). Deiss' testimony, supplemented by the introduction of the land contract and the insurance company's "Sworn Proof of Loss" statement, demonstrated that Deiss purchased the Bar in 1986 and owned it continuously until it was destroyed in 1992. Deiss testified that he never transferred the Bar to Schommer, and Schommer confirmed that he never owned the Bar again after Deiss bought it in 1986. Deiss made regular payments on the land contract to Schommer every month from 1986 until the fire in 1992. From that evidence, the jury reasonably could have found that the Hitching Post Bar was an asset of the debtors' estate when Deiss filed bankruptcy in 1991.

The evidence reflected that Mr. Webster's handwritten worksheet, from which the schedules were prepared, stated that the Bar had been surrendered to Schommer and that the Deisses owned no stock. Deiss testified that Mr. Webster had suggested that the Deisses file bankruptcy and decided how the Bar would be reflected on the bankruptcy documents. Mrs. Deiss testified that Mr. Webster told her, before the section 341 hearing, that the trustee was lazy and would not ask about the Bar, and that, if he did, the Deisses should say it had been surrendered to Schommer. Then, less than a year after the Deisses' bankruptcy case closed, the Bar burned down. Mr. Webster attempted to collect on the insurance policy for the Bar, on Deiss' behalf, without even questioning Deiss' interest in the matter. This evidence could have led a jury reasonably to conclude that Mr. Webster concealed Deiss' ownership of the Bar from the bankruptcy trustee.

There was also evidence from which a jury reasonably could have found the essential elements of knowing

and fraudulent concealment by the defendant. The bankruptcy schedules, first planned on a worksheet and then filled out by Mr. Webster, falsely stated that the Bar was "surrendered" to Schommer in January 1991. Mr. Webster incorporated the Bar for Deiss in February 1991; he backdated the stock certificates to fit the purpose he needed at the time. *See Goodstein*, 883 F.2d at 1364-65 (noting that backdated agreements that validated move of business assets and operation without notice to creditors or court were evidence of fraudulent transfer); *United States v. Center*, 853 F.2d 568, 570-71 (7th Cir. 1988) (concluding that defendant who executed backdated documents to conceal a debt omitted from bankruptcy schedules violated § 152). According to Mr. Webster, the first two certificates were the vehicle by which the Bar was transferred to Schommer. The one certificate declaring Deiss the owner of 50 shares was made around September 1992 to satisfy the insurance company that Deiss owned the Bar. Later, Mr. Webster stated to the insurance company attorney that Deiss merely had pledged stock to Schommer. The lawyer testified at his trial, however, that he had lied concerning the "pledged" stock. A jury could make its own credibility determinations concerning Mr. Webster's convoluted testimony. In addition, it reasonably could have found credible Deiss' testimony. After Deiss had made extensive improvements to the Bar, he hired Mr. Webster to incorporate his business. He was experiencing no particular financial crisis at that time and had no reason to surrender his business to Schommer. Deiss' explanation of the sequence of events could have led a jury reasonably to conclude that lawyer Webster orchestrated Deiss' bankruptcy by fraudulently claiming that

the one major asset, the Bar, was transferred for the mere value of the contract balance – so that his client could keep the newly incorporated business and eliminate the credit card debt without risking the loss of the Bar. *See Key*, 859 F.2d at 1261 (holding that false statement about worthlessness of corporate property was a material falsehood that violated § 152). Mr. Webster's own testimony contains sufficient admissions from which a rational trier of fact could find that he fraudulently concealed assets from the trustee.[17] The Bar was incorporated, not surrendered, in February rather than January, 1991. Deiss owned at least 10% of the stock in the Hitching Post Bar, Inc., and had complete control of the Bar throughout the bankruptcy and afterwards until the fire. Other questions on the bankruptcy forms were omitted or answered falsely. *See United States v. Ellis*, 50 F.3d 419, 423 (7th Cir. 1995) (failure to disclose, on bankruptcy schedules, prior bankruptcies constitutes a "false statement" under § 152); *United States v. Cherek*, 734 F.2d 1248, 1254 (7th Cir. 1984)

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[17] Mr. Webster testified that he lied to the insurance company's attorney; that he backdated all the stock certificates; and that he "could have" written on the bankruptcy schedules that there was a transfer of real property (item 12B), but that "would have been duplicitous [sic]." R.67 at 69-70. He stated that Schommer owned all the shares in the Hitching Post Bar, Inc., when the fire occurred in May 1992, but that he, Mr. Webster, created the second two certificates – 50 shares owned by Deiss and 450 owned by Deiss but pledged to Schommer as security – in September 1992. Mr. Webster had created those two certificates to reconfigure the ownership of the incorporated Bar. Mr. Webster explained that he was "correcting or actually transferring that stock to the way that [Deiss] wanted it transferred and he had I think simply neglected to get it done before that time." *Id.* at 85.

(holding that omissions of material information from bankruptcy petition may support a § 152 conviction), *cert. denied*, 471 U.S. 1014 (7th Cir. 1985). In addition, Mr. Webster's statement in the insurance claim proceedings was directly contrary to that in the concealment trial. The jury had before it all this evidence. It reasonably could have concluded that the transfer of the Bar, in all its forms, was fraudulent and was committed with intent to defeat the bankruptcy laws. *See Goodstein*, 883 F.2d at 1370. We hold that there was sufficient evidence from which the jury could have convicted Mr. Webster of aiding and abetting in the concealment of Deiss' ownership of the Bar.

D. *Fraud Enhancement*

Finally, Mr. Webster challenges the district court's application of the fraud enhancement found at U.S.S.G. § 2F1.1(b)(3)(B), which increases a sentence for "violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines." This circuit has applied the enhancement to bankruptcy fraud convictions on the ground that bankruptcy fraud constitutes a violation of judicial process. *United States v. Michalek*, 54 F.3d 325, 331 (7th Cir. 1995). The district court, relying on *Michalek*, found that Mr. Webster perpetrated "fraud upon the bankruptcy court, fraud upon the proceedings" and concluded that his conduct "was a violation of the judicial process, the bankruptcy process, the bankruptcy court." R.68 at 34.

Mr. Webster claims that the guideline cannot apply to him: First, he violated no judicial or administrative order

of the bankruptcy court; and second, he was not the debtor and thus had no reason to knowingly abuse the bankruptcy process or knowingly hinder the orderly administration of the bankruptcy estate by concealing assets.

Mr. Webster's first submission has been rejected by us and by other circuits who agree that the knowing concealment of assets during a bankruptcy proceeding constitutes a violation of a judicial process within the meaning of the guideline.[18] Mr. Webster's second contention also fails. Just as the Eighth Circuit enhanced the sentence of a non-debtor defendant who was an employee in a business that prepared and filed fraudulent bankruptcy petitions that concealed assets from the

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[18] *See Michalek*, 54 F.3d at 333; *United States v. Mohammad*, 53 F.3d 1426, 1437-38 (7th Cir. 1995); *United States v. Messner*, 107 F.3d 1448, 1457 (10th Cir. 1997); *United States v. Welch*, 103 F.3d 906, 908 (9th Cir. 1996) (per curiam) (discussing earlier cases); *United States v. Cheek*, 69 F.3d 231, 233 (8th Cir. 1995); *United States v. Bellew*, 35 F.3d 518, 520-21 (11th Cir. 1994) (per curiam); *United States v. Lloyd*, 947 F.2d 339, 340 (8th Cir. 1991) (per curiam). *But cf. United States v. Shadduck*, 112 F.3d 523 (1st Cir. 1997) (noting that a bankruptcy rule or official form is not a "judicial order" as used in § 2F1.1(b)(3)(B); holding that government failed to show that defendant violated prior order, decree or injunction; and declining to consider whether defendant violated a judicial "process"); *United States v. Carrozzella*, 105 F.3d 796 (2d Cir. 1997) (holding that § 2F1.1(b)(3)(B) does not require enhancement for filing false accounts with probate court because that conduct is "addressed elsewhere in the guidelines" as abuse of position of trust; and declining to reach question whether § 2F1.1(b)(3)(B) enhancement may be based on bankruptcy fraud involving concealment of assets).

bankruptcy court, *see Welch*, 103 F.3d at 907-08, so too we have no hesitation in finding appropriate this enhancement for Mr. Webster, the attorney who prepared and filed the Deisses' fraudulent bankruptcy forms, who deceived the trustee by stating that Deisses' bankruptcy was a "no-asset" case, who represented Deiss later when he claimed the insurance for the very property he told the bankruptcy court, only a year before, had been transferred to another. The district court did not clearly err in imposing a two-level enhancement pursuant to § 2F1.1(b)(3)(B) for violation of judicial process.

E. *Obstruction of Justice Enhancement*

At the sentencing hearing, the district court also imposed a two-level increase in Mr. Webster's sentence under the obstruction of justice guideline, U.S.S.G. § 3C1.1. Mr. Webster asserts that the district court erred when enhancing his sentence under § 3C1.1 because it failed to make specific findings of perjury. We review the district court's finding that Mr. Webster obstructed justice for clear error. *United States v. Godinez*, 110 F.3d 448, 456 (7th Cir. 1997); *Michalek*, 54 F.3d at 334.

A person who, under oath or affirmation, "gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory," meets the criteria of § 3 C1.1. *United States v. Dunnigan*, 507 U.S. 87, 94, 445 (1993). The guideline increases the offense level of a defendant who "willfully obstructed . . . the administration of justice during the investigation, prosecution, or

sentencing of the instant offense." § 3C1.1. The Commentary includes the following relevant examples of the types of conduct to which § 3C1.1 applies: committing perjury, producing false documents or records during a judicial proceeding, and providing materially false information to a judge or magistrate. U.S.S.G. § 3C1.1, comment. (n.3b, c, f). A finding of perjury results in the enhancement, *see United States v. Guiterrez*, 92 F.3d 468, 472 (7th Cir. 1996), but a finding that the defendant simply denied his guilt will not support the two-level increase. *United States v. Hickok*, 77 F.3d 992, 1007 (7th Cir.), *cert. denied*, 116 S. Ct. 1701 (1996). The Supreme Court's guidance to district courts for making this assessment is succinctly summarized in a recent opinion from our court:

> To minimize the tendency to apply the enhancement woodenly after a defendant testifies in his own defense, the Supreme Court stated that when the defendant objects to the enhancement, the district court should make separate findings sufficient to "establish a willful impediment to or obstruction of justice, or an attempt to do the same." The *Dunnigan* Court went on to stress that "it is preferable for a district court to address each element of the alleged perjury in a separate and clear finding." However, the Court also recognized that the enhancement could be upheld on appeal so long as "the [district] court makes a finding of an obstruction of or impediment of justice that encompasses all of the factual predicates for a finding of perjury."

United States v. Buchannan, 115 F.3d 445, 451 (7th Cir. 1997) (quoting *Dunnigan*, 507 U.S. at 95). On the basis of the *Dunnigan* directives, we have remanded cases in which the district court failed to make specific findings

(*see, e.g., Buchannan,* 115 F.3d at 453) and have affirmed those in which the district court's findings satisfied *Dunnigan* (*see, e.g., Godinez,* 110 F.3d at 457).

In this case, we believe the district court failed to state with adequate clarity the factual basis for its conclusion that the defendant deserved the enhancement. Concerning the first false statement mentioned by the district court, the government agrees with the defendant that there was no contradictory testimony about when the incorporation of the bar was completed and we shall not speculate, as the government suggests, that the district court may have meant to refer to the inconsistent testimony about when the stock certificates were completed. The court's finding that Mr. Webster testified falsely before both the bankruptcy and the district courts also lacks the sort of specificity required under *Dunnigan*. The court's reference to the "overwhelming evidence" that had been summarized earlier in the sentencing proceeding, when the court denied the defendant's motion for acquittal, is not sufficient. It is incumbent upon the court "to address each element of the alleged perjury in a separate and clear finding" or to make a finding of an obstruction of justice that encompasses all of the factual predicates for a finding of perjury. *Dunnigan,* 507 U.S. at 95. "Our cases hold that 'a district judge deciding whether to apply a sentence enhancement for obstruction of justice need not conduct a mini-trial with respect to each of the defendant's false statements.' " *Godinez,* 110 F.3d at 456. Nevertheless, more specificity than is present here must be evident in the record.[19]

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[19] In its brief, at page 31, the government suggests that this court has been lenient in enforcing *Dunnigan*'s requirement that

Conclusion

For the foregoing reasons, the judgment of the district court is affirmed in part and vacated in part. The case is remanded for proceedings consistent with this opinion.

AFFIRMED IN PART,
VACATED IN PART and REMANDED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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clear findings of perjury be made by the district court and has accepted "fairly rudimentary observations" by various district courts. We have examined with care the cases cited by the government and conclude that the district courts in those cases stated findings far more probative of perjury than the finding we have before us in this case.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

October 9, 1997.

BEFORE

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. ILANA DIAMOND ROVNER, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee,	Appeal from the United States District Court for the Western District of Wisconsin.
No. 97-1189 v.	No. 96 CR 48
LESLIE J. WEBSTER, Defendant-Appellant.	John C. Shabaz, Chief Judge.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed on September 26, 1997 by the defendant-appellant, no judge in active service has requested a vote thereon, and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

LESLIE J. WEBSTER,

Defendant.

REPORT AND RECOMMENDATION

Case No. 96-CR-48-S

REPORT

Before the court for report and recommendation is defendant Leslie Webster's motion to dismiss the indictment (Dkt. 7). The indictment charges Webster in three courts with bankruptcy fraud, providing a false material statement in a bankruptcy proceeding, and with making a false material oath in a bankruptcy proceeding. Webster claims that all three counts are fatally defective because none of them sets out the "essential facts" of the offenses charged. Webster argues that the indictment does not set forth the elements for proving fraudulent conduct and does not describe the property, statements, or oaths at issue.

In a two phase response to the motion to dismiss, the government first acceded to Webster's motion for a bill of particulars (Dkt. 9) by providing the requested information, namely the factual background for each count. (Dkt. 20). Now, in response to Webster's motion to dismiss, the government argues that the indictment is sufficient

because it adequately informs Webster of the nature of the charges against him.

Webster's arguments have some merits but it does not appear that the indictment returned against him is defective. Although the most cautious approach would be to require the government to re-indict and incorporate the information contained in the bill of particulars, it does not seem that this is legally necessary. I am recommending that this court deny Webster's motion to dismiss.

The indictment speaks for itself. In each of the three counts, the grand jury has stated a date of the offense and then tracked the statutory language. Count I charges Webster with concealing property from a bankruptcy trustee, without specifying either the bankruptcy proceeding or the property concealed. Count II charges Webster with making a false material statement under penalty of perjury in relation to a case under Title 11 of the U.S. Code, without specifying either the proceeding or the false material statement. Count III charges Webster with making a false material oath in relation to a case under Title 11 without specifying the proceeding or the oath. (Dkt. 2). Each count is charged under both 18 U.S.C. §§ 152 and 2.

In its bill of particulars the government states that the activity charged in Count I was Webster aiding and abetting the concealment of Steven Deiss's ownership of the Hitching Post Bar; the false statement(s) charged in Count II were those relating to the Deisses' surrender of the Hitching Post Bar to Joseph Schommer and the Deisses not having any stock or interest in incorporated

or unincorporated companies; the statements at issue in count III were those made by Steven and Shelly Deiss to the bankruptcy trustee in which they represented that the documents they filed in connection with their bankruptcy petition were true, correct and complete. The government submitted exhibits in support of the second and third particulars. (Dkt. 20).

In order to be valid, an indictment must meet both constitutional standards and the requirements of the federal Rules of Criminal Procedure. An indictment is constitutionally sufficient if it 1) states all the elements of the offense charged, 2) informs the defendant of the nature of the charge, enabling the defendant to prepare a defense, and 3) enables the defendant to plead the judgment as a bar to a later prosecution of the same offense. *United States v. Allender*, 62 F.3d 909, 914 (7th Cir. 1995); *United States v. F.J. Vollmer & Co., Inc.*, 1 F.3d 1511, 1518 (7th Cir. 1993). Fed. R. Crim. P. 7(c)(1) required that indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Generally, an indictment is sufficient to apprise a defendant of the charges against him if it sets forth the elements of the offense charged, the time and place of the defendant's conduct which allegedly violated that offense, and the citations of the statutes charged. *United States v. Roya*, 574 F.2d 386, 391 (7th Cir. 1978); *United States v. Norris*, 833 F. Supp. 1392, 1401 (N.D. Ind. 1993).

Webster claims that in order to prepare an adequate defense, he also needs to know: 1) what property was allegedly concealed and the bankruptcy estate involved, 2) the content of the alleged false material statement and who made it, and 3) the content of the alleged false oath

and who made it. (Dkt. 8 at 7-8). By providing a bill of particulars that provides this information the government has essentially conceded that Webster is entitled to this information. The dispute is whether the failure of the grand jury to include this information in the indictment itself invalidates the indictment.

Under both Fed. R. Crim. P. 7(c)(1) and the constitutional standard for indictments, Webster is entitled to the essential facts constituting the offenses charged. *Russell v. United States*, 369 U.S. 749, 764-65 (1962) (citations omitted); *United States Ex Rel. Ballard v. Bengston*, 702 F.2d 656, 660-61 (7th Cir. 1983). However, the indictment need not "set forth facts and evidentiary details necessary to establish each of the elements of the charged offense." *United States v. Williams*, 679 F.2d 504 (5th Cir. 1982). The principal concern behind the requirements is that an indictment should apprise a defendant of the "nature of the accusation against him." *Russell*, 369 U.S. at 766.

The Court in *Russell* mused on this issue at length in its consideration of a set of cases charged under 2 U.S.C. § 192. The cases arose out of some relatively open-ended congressional investigations into "communist infiltration . . . of new-dispensing agenc[ies]." 369 U.S. at 773 (Douglas, J., concurring, quoting Senate Committee transcripts). The various defendants had been indicted on the charge of refusing to answer questions "pertinent to the question then under inquiry" by a Congressional subcommittee. 369 U.S. at 752. The indictments, however, did not state the subject of the subcommittee's investigation. 369 U.S. at 753. In dismissing all the indictments, the court found that this missing information was necessary to the indictment. 369 U.S. at 754-55. The Court noted that

absent such an averment, it was difficult or impossible for a court or a defendant – to discern what the subject matter of the inquiry had been. It was thus equally difficult or impossible for a defendant to discern "what he must be prepared to meet." 369 U.S. at 759 and 764. The Court noted that in cases such as those before it, more factual detail was required in the indictment so that the trial did not commence with the chief issue undefined, which would allow the government to change its theory at trial and allow conviction on one theory and affirmance on appeal on another. 369 U.S. at 765-66.

On the cases before it, the court concluded that bills of particulars would not have sufficed to cure the deficiencies of the indictments, because "a bill of particulars cannot save an invalid indictment." 369 U.S. at 770. Only the grand jury knew what the "question under inquiry" was, and it would deprive a defendant of his fifth amendment right to the buffer of a grand jury "to allow the prosecutor or the court to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment." 369 U.S. at 770. The court may not change the indictment to suit its own notions of what the indictment ought to have been, or what the grand jury would probably have made it if their attention had been called to the suggested changes. 369 U.S. at 770.

Although this was all *dicta* in *Russell*, other cases amplify the concept, albeit in a different context. Because the Grand Jury Clause of the Fifth amendment limits the available bases for conviction to those contained in the indictment, a bill of particulars that broadens the basis of the indictment returned by the grand jury or differs from

it constitutes constructive amendment, which is reversible error. *Cf. United States v. Willoughby*, 27 F.3d 263, 266 (7th Cir. 1994) (discussing constructive amendment in the context of proof at trial); *United States v. Thompson*, 23 F.3d 1225, 1229-30 (7th Cir. 1994) (to the same effect).

That being so, it appears that where a bill of particulars simply clarifies the undisputed basis of the grand jury's indictment, then the indictment itself is not invalid. This would be analogous to the concept of "variance," which is the narrowing the indictment without adding any new offenses. Variance from the indictment is allowed without resubmission to the grand jury. *United States v. Willoughby*, 27 F.3d at 266; *United States v. Thompson*, 23 F.3d at 1230. A bill of particulars is analogous to variance, but it is not equivalent, because there isn't really a variance at all: there is only the provision of the particular facts on which the grand jury actually relied in returning the charges.[1] Obviously, the predicate for allowing the government to proceed in this fashion is that the grand jury's actual intent is discernible without guessing or deduction. Otherwise, there would be no assurance that the bill of particulars accurately reflected the grand jury's theory in returning the indictment.

Here, the indictment itself is terse, but it does not suffer from the defects of the indictments dismissed in

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[1] "A bill of particulars is not part of the indictment, nor does it constitute a change or an amendment of the changes as set forth in the indictment or information. It merely amplifies the indictment by providing missing or additional information so that the defendant can effectively prepare for trial." *United States v. Fletcher*, 74 F.3d 49, 53 (4th Cir. 1996).

Russell. It sets forth the elements of each offense and provides the requisite information on the date and location of the alleged violations, enabling Webster to prepare a defense and plead any resulting judgment as a bar to a later prosecution of the same offenses. *See United States v. Hinkle,* 637 F.2d 1154, 1157-58 (7th Cir. 1981).

The holding in *Hinckle* seeks to support Webster's view that the instant indictment must be dismissed, but *Hinckle*'s reasoning is suspect. *Hinckle* is too conclusory to be persuasive on the issue whether a bill of particulars could have saved the indictment the court found defective. In *Hinckle* the court found that an indictment charging a defendant with using a telephone on dates charged to facilitate acts constituting a felony under Title 21 was fatally deficient. 637 F.2d 1156, 1158. The court held that an indictment under 21 U.S.C. § 843(b) had to specify the type of communication facility used, the date, the controlled substance involved, and "some sort of statement of what is being facilitated with that controlled substance which constitutes a felony." 637 F.2d at 1158. The court held that this "crucial, minimal information" was necessary to protect a defendant's right to be apprised of the charge against her and to establish a record to bar double jeopardy. *Id.*

Prior to this, the court had stated, without explanation, that "the government did not provide a bill of particulars, which in any event would not have cured this deficient indictment." *Id.* at 1156. The court did not say why this was so. Subsequent cases reveal a more liberal view. In *United States v. Canino,* 949 F.2d 928, 949 (7th Cir. 1991), the court held that a defendant is not entitled to a bill of particulars at all if the indictment sufficiently

apprises the defendant of the charges to enable him to prepare for trial; *see also United States v. Kendall*, 665 F.2d 126, 134 (7th Cir. 1981). Other courts agree that a bill of particulars "is appropriate when the indictment is insufficient to permit the preparation of an adequate defense." *United States v. Upton*, 856 F.Supp. 727, 741-42 (E.D.N.Y. 1994) (citing *United States v. DiCesare*, 765 F.2d 890, 897 (9th Cir. 1985)); *United States v. Fletcher*, 74 F.3d at 53.

Approaching the issue from another angle, in *United States v. Leichtnam*, 948 F.2d 370 (7th Cir. 1991), the court overturned a § 924(c) conviction on the ground that although the grand jury had specified one of three guns as having been possessed by the defendant, the petit jury subsequently heard evidence about all three then returned a general verdict of guilty. 948 F.2d at 379. In *dicta* the court noted "obviously, the government could easily have drawn up Leichtnam's indictment to charge him simply with having used or carried 'a firearm.' But it did not do so, and the description it gave of the gun in the indictment . . . was not mere surplusage." *Id.* The clear import of this observation is that factual detail is simply not necessary for an indictment to be valid.

In light of all this, it is not clear to what degree the holding and *dicta* of *Russell* apply to this case. Regardless the concerns expressed in *Russell* are not present here. At this court's request, on October 15, 1996 the government submitted a copy of the grand jury transcript in this case. (Dkt. 26, under seal).[2] The transcript shows a narration of

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[2] I surmise that the government did not advise Webster that it had submitted this transcript. While the transcript is properly

the investigation that led to the instant indictment coupled with the presentation of two exhibits to the grand jury. There is only one theory of culpability presented and it corresponds with the charges returned in the indictment. No one has to guess what the grand jury had in mind here. The bill of particulars accurately reflects the evidentiary detail presented to the grand jury.

In sum, the indictment sufficiently charges Webster with violations of 18 U.S.C. §§ 2(a) and 152(1), (2), and (3). The bill of particulars has provided Webster the information he needs to prepare his defense and plead jeopardy as a bar to any subsequent prosecution. There is no legal need to dismiss the indictment.

RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1)(B) and for the reasons stated above, I respectfully recommend that defendant Leslie Webster's motion to dismiss the indictment be denied in all respects.

Entered this 18th day of October, 1996.

BY THE COURT:

/s/ Stephen L. Crocker
STEPHEN L. CROCKER
Magistrate Judge

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submitted *ex parte*, it was not this court's intent that the act of requesting it or producing it be kept from Webster.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

LESLIE J. WEBSTER,

Defendant.

MEMORANDUM AND ORDER

96-CR-048-S-01

Before the Court in the above entitled matter is the report and recommendation of the Hon. Stephen L. Crocker, Magistrate Judge, to deny the defendant's motion to dismiss the indictment. Count I of the indictment states as follows:

> On or about March 25, 1991, in the Western District of Wisconsin, the defendant, Leslie J. Webster, knowingly and fraudulently concealed from a trustee charged with the control and custody of property in connection with a case under Title 11 of the United States Code, property belonging to the estate of a debtor in bankruptcy.
>
> (All in violation of Title 18, United States Code, Sections 152(1) and 2(a).)

Counts II and III are not considered in this Memorandum and Order because the government subsequent to the report and recommendation moved to dismiss them, which motion has now been granted. Accordingly, this order will relate only to Count I.

On September 3, 1996 the defendant moved to dismiss the indictment for failure to include "essential facts" constituting the offense charged pursuant to Rule 12(b)(2) Federal Rules of Criminal Procedure advising that the failure to include essential facts in the indictment deprives defendant of his right to be indicted by a grand jury, exposes him to a risk of double jeopardy and fails to inform him of the nature and cause of the accusation in violation of the Fifth and Sixth Amendments to the United States Constitution.

The defendant also moved for a Bill of Particulars in the event his motion to dismiss is denied to which the government responded as follows:

> (1) The transaction or activity constituting the offense charged in Count I of the indictment was the defendant's aiding and abetting the concealment of Steven Deiss' ownership of the Hitching Post Bar.

In order to be valid an indictment must meet both constitutional standards and the requirements of the Federal Rules of Criminal Procedure. An indictment is constitutionally sufficient if it 1) states all the elements of the offense charged, 2) informs the defendant of the nature of the charge, enabling the defendant to prepare a defense, and 3) enables the defendant to plead the judgment as a bar to a later prosecution of the same offense. Federal Rules Criminal Procedure 7(c)(1) requires that indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Generally, an indictment is sufficient to apprise a defendant of the charges against him if it sets forth the elements

of the offense, and the citations of the statues [sic] charged.

As aforesaid, the defendant claims that in order to prepare an adequate defense he needs to know at Count I what property was allegedly concealed and the bankruptcy estate involved. The Bill of Particulars provides the information requested and simply clarifies the undisputed basis of the Grand Jury's indictment. The indictment itself is not invalid. The Bill of Particulars does not broaden the basis of the indictment returned by the Grand Jury. Instead it informs the defendant of the nature of the charge enabling him to prepare a defense and to plead the judgment as a bar to a later prosecution of the same offense. The indictment itself does not suffer from defects which cannot be supplemented with the Bill of Particulars provided. It has set forth the elements of Count I and has provided information of the date and location of the alleged violations. The Bill of Particulars adequately reflects the evidentiary detail presented to the Grand Jury and assists the defendant in the preparation of an adequate defense.

Although Count I of the indictment sufficiently charges the defendant with a violation of Title 18, United States Code, Sections 152(1) and (2)(a), the Bill of Particulars supplements the defendant's ability to prepare his defense and plead jeopardy as a bar. As the Magistrate Judge suggested the cautious approach would be to require the government to reindict. However, there is no legal need to dismiss the indictment. Counts II and III have already been dismissed with the reservation that the government reserves the right to use evidence relating to the offenses set forth therein as evidence of the offense

charged in Count I. These offenses have also been more specifically described in the Bill of Particulars previously provided setting forth the content of the false statements allegedly made under penalty of perjury relating to Deiss' surrender of the Hitching Post Bar to Joseph Schommer as well as the statements of the debtors Steven and Shelley Deiss to the bankruptcy trustee at Count III when they apparently alleged that the documents filed with the petition were true and correct.

Accordingly, the Court accepts the report and recommendation of the Magistrate Judge adopting as its own those findings of fact and conclusions of law proposed therein.

ORDER

IT IS ORDERED that the defendant's motion to dismiss the indictment (Count I thereof) is DENIED.

Entered this 29th day October, 1996.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

LESLIE J. WEBSTER,

Defendant.

Case No. 96-CR-0048-S-01

Madison, Wisconsin
November 4, 1996
8:33 a.m.

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EXCERPT OF PROCEEDINGS
TRANSCRIPT OF CONFERENCES AND TESTIMONY
HAD ON FIRST DAY OF JURY TRIAL
BEFORE THE HONORABLE JOHN C. SHABAZ

[p. 6] THE COURT:

* * *

The Court examining once again Docket No. 20, the response to the defendant's motion for a bill of particulars, and also incorporating a response offered by the government when it dismissed Counts 2 and 3 of the Indictment to which this Court referred at the time that it accepted the Magistrate recommendation to deny the dismissal of the Indictment. The Court at that time was aware that the government had the reservation at that time that it reserved the right to use evidence relating to the offenses set forth therein as evidence of the offense charged in Count 1, referring them to Counts 2 and 3 and those offenses were also more specifically described in the bill of particulars.

And so if we look at the government's response to the defendant's motion for the bill of particulars it does relate to the transaction, number one, or activity, that's Count 1, constituting the offense charged in Count 1 of the Indictment, aiding and abetting the concealment of Deiss's ownership of the Hitching Post Bar. The false statement referred to in [p. 7] Count 2 which has now been dismissed upon which the government reserved for the use therein of the documentation which may have been described in this bill of particulars was the statements related to the Deisses' surrender of the bar to Schommer and their not having any stock or interest in incorporated or unincorporated companies, and finally any statements in Count 3 representing that the documents filed were true and correct.

The Court believes that the transaction or activity constituting the offense charged in Count 1 of the Indictment, the concealment of the ownership of the Hitching Post Bar, is inclusive of many of those documents which may very well have been an indicia of ownership, whether it be stock certificates, whether it be a land contract, whether it be a security agreement, whether it be an indicia of ownership relating thereto and whether it – I suppose you could have fixtures as well as those items which were improvements to the bar. But in any event I believe that the Indictment is specific as well as broad enough to show what those indicia of ownership were and the Court will address those individual objections which counsel makes during the course of trial to determine whether or not they do fit within the bill of particulars to which this Court has referred.

* * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

LESLIE J. WEBSTER,

Defendant.

Case No.
96-CR-0048-S-01

Madison, Wisconsin
January 14, 1997
1:25 p.m.

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TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE JOHN C. SHABAZ

* * *

[pp. 33-34] THE COURT: The Court addressing 2F1.1(b)(3)(B) does determine that the defendant did abuse the bankruptcy process and hindered the orderly administration of the Deiss bankruptcy by concealing assets. The Court's examination of *Michalek* does suggest that violations of 18, United States Code, Section 152 in their most basic form involve a higher level of culpability and thus deserve greater punishment than some of the other crimes that correspond to Guideline 2F1.1.

The Court does determine that this was fraud upon a bankruptcy court, fraud upon the proceedings. That this does merit a sanction greater than those other frauds which do not involve that element and the Court does accept the recommendation as suggested by the Probation Office.

The Court had previously announced its reading of 2F1.1(b)(3)(B) having previously examined the recommendation as well as the page, appropriate page of the guideline where again "violation of any judicial or administrative order, injunction, decree, or process not addressed elsewhere in the guidelines, increase by 2." This was a violation of the judicial process, the bankruptcy process, the bankruptcy court. If the resulting offense level is less than 11, increase to Level 10.

* * *

United States District Court
Western District of Wisconsin

JAN 21 1997

UNITED STATES OF AMERICA

v.

LESLIE J. WEBSTER

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 3:96CR00048-001

* * *

01/14/1997
Date of Imposition of Judgment

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

Date Signed: January 17, 1997

* * *

STATEMENT OF REASONS

* * *

The base offense level for a violation of Title 18 U.S.C. § 152 Bankruptcy Fraud has as its most appropriate guideline § 2F1.1(a) establishing a level of 6. Guideline § 2F1.1(b)(3)(B) addresses an offense involving a violation of a judicial or administrative order, injunction, decree or process not addressed elsewhere in the guidelines. Where the offense level is less than 10, this section of the guideline directs an increase to level 10. There is then added to the base offense level of 6, a level of 4 for the defendant's bankruptcy fraud. The section authorizes courts to enhance the base level specifically for a violation of any judicial process to include the concealing of assets from the bankruptcy court. It demonstrates that violations of Title 18 U.S.C. § 152 involve a higher level of culpability and deserve a greater punishment. Although this defendant is not a debtor, he is an attorney at law and an officer of the court who fully counseled, abetted and aided a debtor's violation of the bankruptcy law and the bankruptcy court. He should receive the offense level increase for the abuse of the judicial bankruptcy process by concealing assets in a debtor's proceeding. This enhancement is provided even though the defendant has not violated a specific court order for he did violate a specific adjudicatory process.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA v. LESLIE J. WEBSTER, Defendant.	INDICTMENT Case No. 96-CR-48-S

THE GRAND JURY CHARGES:

COUNT I

On or about March 25, 1991, in the Western District of Wisconsin, the defendant,

LESLIE J. WEBSTER,

knowingly and fraudulently concealed from a trustee charged with the control and custody of property in connection with a case under Title 11 of the United States Code, property belonging to the estate of a debtor in bankruptcy.

(All in violation of Title 18, United States Code, sections 152(1) and 2(a).)

COUNT II

On or about March 25, 1991, in the Western District of Wisconsin, the defendant,

LESLIE J. WEBSTER,

knowingly and fraudulently made a false material statement under penalty of perjury in relation to a case under Title 11 of the United States Code.

(All in violation of Title 18, United States Code, Sections 152(3) and 2(a).)

COUNT III

On or about April 29, 1991, in the Western District of Wisconsin, the defendant,

LESLIE J. WEBSTER,

knowingly and fraudulently made a false material oath in relation to a case under Title 11 of the United States Code.

(All in violation of Title 18, United States Code, Sections 152(2) and 2(a).)

A TRUE BILL

/s/ Diane Blied
PRESIDING JUROR

/s/ Grant Johnson
for Peggy A. Lautenschlager
United States Attorney

Indictment returned: 7/10/96

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA v. LESLIE J. WEBSTER, Defendant.	)	Case No. 96-CR-48-S

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION FOR A BILL OF PARTICULARS

The United States hereby responds to the defendant's motion for a bill of particulars as follows:

(1) The transaction or activity constituting the offense charged in Count 1 of the indictment was the defendant's aiding and abetting the concealment of Steven Deiss' ownership of the Hitching Post Bar.

(2) The false statement made under penalty of perjury as alleged in Count II of the indictment was contained in the bankruptcy petition and associated documents filed by the defendant on behalf of Steven and Shelly Deiss. The particular statements related to the Deiss' surrender of Hitching Post Bar to Joseph Schommer and their not having any stock or interest in incorporated and unincorporated companies. Those representations have been furnished in the course of discovery and are circled on Exhibit A attached to this response.

(3) The statements at issue in Count III of the indictment are those of Steven and Shelly Deiss to the bankrutpcy trustee where they represented that the documents filed in connection with their bankruptcy petition are true, correct and complete. A transcript of those statements is attached as Exhibit B.

The government submits that this bill of particulars satisfies the defendant's demand and, accordingly, the government does not intend to file a brief in response to the defendant's motion for a bill of particulars.

Dated this 19th day of September, 1996.

Respectfully submitted,

PEGGY A. LAUTENSCHLAGER
United States Attorney

By: /s/ Daniel P. Bach
DANIEL P. BACH
Assistant U.S. Attorney

GOVERNMENT EXHIBIT A

13. Repossessions and returns.

Has any property been returned to, or repossessed by, the seller or by a secured party during the year immediately preceding the filing of the original petition herein? (If so, give particulars, including the name and address of the party getting the property and its description and value.)

Voluntarily surrendered Bar business to Joseph Schommer in January 1991 for release of unpaid balance of Land Contract

Schedule B-2 Personal Property

(t) Stock and interests in incorporated and unincorporated companies. Itemized separately. 0

GOVERNMENT EXHIBIT B

[omitted]